

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DENNIS FALK,

Appellant,

V.

SOUTHWEST AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB No. 86-64.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW and
ORDER

This matter, the appeal of a Notice Violation and civil penalty of \$1000 for outdoor burning allegedly in violation of Section 400-035 of respondent's General Regulations for Air Pollution Sources came on for hearing before the Board; Wick Dufford, presiding, and Judith A. Bendor, at Vancouver, Washington on March 31, 1987. Respondent agency elected a formal hearing pursuant to WAC 371-08-155. Tam L. Kern officially reported the proceeding.

Appellant Dennis Falk appeared and represented himself. Respondent Southwest Air Pollution Control Authority (SWAPCA) appeared and was represented by its attorney, Curt Wyrick, Chief Civil Deputy for Clark County.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Argument was heard.

3 From the testimony, exhibits and contentions of the parties the
4 Board makes these

5 FINDINGS OF FACT

6 I.

7 The Southwest Air Pollution Control Authority is a multi-county
8 agency empowered under the terms of the state's Clean Air Act to
9 conduct a program of air pollution prevention and control in an area
10 which includes Clark County.

11 The agency has filed with the Board a certified copy of its
12 General Regulations for Air Pollution Sources, and amendments thereto,
13 of which we take judicial notice

II.

15 Appellant Dennis Falk is a private citizen who maintains his
16 residence in Seattle, Washington, but owns real property in Clark
17 County.

18 III.

19 On March 5, 1986, SWAPCA received an anonymous complaint about
20 open burning on property at approximately 115th and fourth Plain
21 Boulevard in Clark County near Vancouver, Washington.

22 SWAPCA Inspector Jackie Sherby was dispatched to the scene
23 arriving at about 1:30 p.m. She observed four piles of material
24 burning in an open field. One of these was burning vigorously. The
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1 other three were smoldering. Shortly after her arrival, she
2 encountered appellant's brother at the site and told him the fires
3 violated SWAPCA's regulations and should be extinguished. He
4 refused. The same message was repeated to appellant on his arrival.
5 Appellant told her to leave the property. She said she wanted to do a
6 more thorough inspection. Appellant's response was to tell her she
7 was trespassing and to order her off the land.

8 Inspector Sherby left and secured the assistance of a sheriff's
9 deputy. She returned with the deputy who informed appellant of the
10 statutory power of entry provision (RCW 70.94,200) for air pollution
11 authority inspectors. Appellant, then, allowed her on the property
12 and she proceeded with a closer inspection.

13 IV.

14 She took pictures of the various burning piles, identifying them
15 by number as piles #1, #2, #3 and #4. Her observations confirmed the
16 presence of the following in the burning piles: Pile #1 - metal cans,
17 a mattress, paper, auto seats, trash; pile #2 - asphalt roofing
18 material, painted particle board; pile #3 - cans, glass, metal; pile
19 #4 - plastic jugs, roofing scraps. A strong smell was distinctly
20 noticeable to the inspector. It was not the smell characteristic of
21 burning natural vegetation.

22 V.

23 While Inspector Sherby was at the scene appellant Falk admitted to
24 her that he was responsible for the burning. On later checking with
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1 the County Assessor's office she verified that Mr. Falk is listed as
2 the owner of the parcel.

3 Before leaving the site, Sherby filled out and issued to appellant
4 a "Field Notice of Violation." The notice asserted a violation of
5 Section 400-035 of SWAPCA's General Regulations and RCW 70.94.775.
6 Falk refused to acknowledge receipt by signing.

7 VI.

8 In addition to summoning the sheriff's deputy, Inspector Sherby
9 called her office and asked for assistance from there. Tom Tabor, a
10 senior air quality control specialist, responded, arriving at the
11 scene of the burning about 2:30 p.m. Tabor, like Sherby, observed
12 four piles of burning material. He testified that painted lumber,
asphalt shingles, plastic jugs and other items of debris were burning
14 or showed evidence of having been burned. He took a close-up
15 photograph of pile #4, which shows asphalt roofing on fire while he
16 was there.

17 Tabor discussed the fires with appellant Falk. He advised that
18 multiple penalties for multiple violations might be assessed and told
19 Falk that the fires would have to be extinguished. Falk refused to
20 put the fires out because, he said, the effort might cause a grass
21 fire in the area.

22 The SWAPCA inspectors left the scene at about 2:55 p.m.

23 VII.

24 On March 7, 1986, SWAPCA's Tabor returned to the burn site and
25 observed that piles #1, #2 and #4 were still burning. He took photos

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27 FINAL FINDING OF FACT

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1 of these three burning piles and noted that traces of asphalt roofing
2 were still visible in pile #4. The odor of burning asphalt was
3 pronounced. The wind was blowing directly toward a nearby restaurant.

4 Tabor then called the local fire department and asked that they
5 put the fires out. Firemen arrived and poured water on the fires
6 causing the smoke and odor to subside.

7 On March 10, 1986, Tabor checked the site again only to find that
8 the fire in pile #4 had rekindled and that again a pronounced odor was
9 being emitted. A final re-check on March 14, 1986, revealed that pile
10 #4 was still smoking.

11 VIII.

12 On March 17, 1986, SWAPCA served appellant Falk by certified mail
13 with a Notice of Violation which assessed a civil penalty of \$1000 for
14 alleged violation of Section 400-035 and RCW 70.94.775 for permitting
15 and maintaining four open fires containing material other than natural
16 vegetation. W.W. Clarke, who was then acting as the Control Officer
17 for SWAPCA, testified that he personally determined the amount of the
18 penalty after reviewing the case with his investigating staff and
19 weighing the circumstances. He said that the \$1000 represents an
20 aggregate amount, with each of the four fires assessed at \$250.

21 IX.

22 Appellant's defenses were, principally, that the fires in question
23 did not bother anyone and that, in any event, the procedures used by
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1 the agency both in gathering evidence and in assessing the penalty
2 were unconstitutional.

3 X.

4 Any Conclusion of Law which is deemed a Finding of Fact is hereby
5 adopted as such.

6 From these Findings the Board comes to these

7 CONCLUSIONS OF LAW

8 I.

9 The Board has jurisdiction over these persons and this subject
10 matter. Chapters 70.94 RCW and 43.21B RCW.

11 II.

12 As a creature of statute exercising quasi-judicial authority, this
13 Board lacks the power to determine constitutional questions. Yakima
14 County Clean Air Authority v Glascam Builder, Inc., 85 Wn.2d 255, 534
15 P.2d 33 (1975). Accordingly, our decision here presumes the
16 constitutionality of the procedures employed, and addresses the case
17 under the statutory law of this state.

18 III.

19 RCW 70.94.775, a section of the State Clean Air Act, reads as
20 follows, in pertinent part:

21 No person shall cause or allow any outdoor
22 fire: (1) Containing garbage, dead animals,
23 asphalt, petroleum products, paints, rubber
24 products, plastics or any other substance other
than natural vegetation which normally emits
dense smoke or obnoxious odors....

25 Section 400-035 of SWAPCA's General Regulations for Air Pollution

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1 Sources, prohibits open fires containing the same list of materials
2 set forth in the statute.

3 IV.

4 We conclude that the four open fires in question violated the
5 provisions of RCW 70.94.775 and Section 400-035 of SWAPCA's rules.

6 V.

7 Proof of harm is not necessary to showing a violation of these
8 sections. The kind of burning described is flatly forbidden.
9 Therefore, appellant's argument that his burning resulted in no proven
10 harm is of no avail. The argument is like stating that the speed
11 limit does not apply when no one gets hurt.

12 VI.

13 The regulatory scheme involved here is a strict liability regime.
14 Explanatory matters, however, are relevant to the reasonableness of
15 the penalties assessed.

16 In this case, appellant made no effort to offer any explanation or
17 excuse, choosing instead to rely on his legal arguments.

18 The appropriateness of the amount of penalty involves our
19 consideration of factors including:

- 20 a. The nature of the violation;
21 b. The prior behavior of the violator
22 c. Actions taken after the violation to solve
the problem

23
24 Puget Chemco, Inc. v PSAPCA, PCHB Nos. 84-245 et al. (1985)

25 The civil penalty provision of the statute provides that each

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1 violation is a separate and distinct offense and that each day's
2 continuance is a separate violation. RCW 70.94.431. A penalty of
3 \$1000 may be assessed for each violation. Under the uncontroverted
4 testimony, the total penalty assessed here is for less then the
5 maximum which could have been assessed.

6 Given all the circumstances, we view this unexplained burning in
7 violation of the statute as serious. Although there is no record of
8 prior violations, we find the appellant's disinterest in solving the
9 problem a matter of concern. The prime purpose of civil penalties is
10 to influence behavior, both of the perpetrator and of the public
11 generally. We think the level of sanction in this case was eminently
12 reasonable, in light of this objective.

13 VII.

14 Any finding of Fact hereinafter determined to be a Conclusion of
15 Law is hereby adopted as such.

16 From these conclusions, the Board makes this
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ORDER

The Notice of Violation assessing a penalty of \$1000 to Dennis Falk is affirmed.

DONE this 16th day of June, 1987.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
Wick Dufford, Member

Judith A. Bendor
Judith A. Bendor, Member